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Supreme Court of the United States

October Term, 1941
No. 3

THE TIMES-MIRROR COMPANY, a Corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the Supreme Court of California.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF ON REARGUMENT.

T. B. COSGROVE,
JOHN N. CRAMER,
1031 Rowan Building, Los Angeles,
Counsel for Petitioners.

F. B. YOAKUM, JR.,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF ON REARGUMENT.

Neither respondent's oral argument nor its brief filed subsequent thereto related to matters not fully covered by petitioners' briefs, with the exception of respondent's contentions:

1. That the *Sinclair*[1] and *Cox*[2] cases require an affirmance of the judgment, and

2. That the California statute prohibiting summary punishment for constructive contempt by publication must be ignored.

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[1]*Sinclair v. United States*, 279 U. S. 749.

[2]*Cox v. New Hampshire*, 312 U. S. 569.

The Holding in the Sinclair Case Is Not Controlling—The Case Did Not Involve the Exercise of Any Constitutional Right.

Upon oral argument and in brief filed subsequent thereto, respondent insists that the *Sinclair decision* is controlling because it applied the reasonable tendency standard to the facts there presented. In the *Sinclair case* the court was dealing with jury-shadowing—a right not guaranteed by the federal constitution. Jury-shadowing contributed to the mistrial.[3] In the instant case constitutional guarantees are involved, viz., freedom of speech and of the press—"the indispensable condition of nearly every other form of freedom."[4] In the regulation of most activities, governmental authorities have broad discretion, but not where freedom of speech and of the press is concerned.[5]

Cox v. New Hampshire Does Not Support the Judgment Under Review.

In *Cox v. New Hampshire*, 312 U. S. 569, the constitutionality of the New Hampshire parade-licensing statute was unanimously upheld as applied by the state court to the facts of the case. Respondent asserts that this decision

> "marked out a clear pathway for a correct solution of this case."
>
> (Br. Rearg. 44.)

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[3]279 U. S. at 756 and 760.

[4]Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 319, at 327.

[5]*Schneider v. State*, 308 U. S. 147, at 161; concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, at 377-378.

We understand the opinion does not approve abridgment of freedom of speech. Freedom of speech was not curtailed. The opinion points out that the state statute neither in purpose nor effect restricted the right of the individual to communicate views (312 U. S. at 573, 575 and 578). The conduct for which a license was required was the concerted activity of participating in a parade, and not the exercise of free speech. The statute was specific in its requirements and its enumeration of forbidden acts. No one was obliged to speculate as to what constituted a violation of its terms.

In Determining the Declared Policy of the State of California, the Court Should Consider Subdivision 11 of Section 1209, Code of Civil Procedure.

Upon oral argument and in our Brief on Reargument, we contended that the public policy of California, in so far as the legislature is able to declare, appears in subdivision 11 (formerly 13) of Section 1209, *Code of Civil Procedure*.[6] Respondent replies that

> "Subd. 13 has the same place in California jurisprudence as if it had never been enacted."
>
> (Br. Rearg. 51.)

Respondent argues that subdivision 8 of Section 1209 of the *Code of Civil Procedure* creates a statutory standard

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[6]Subdivision 11: "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

for constructive contempt by publication.[7] The California courts in opinions in the *Times* and *Bridges* cases made no reference to subdivision 8 of Section 1209. Obviously, the legislature intended public policy to be expressed by subdivision 11. This subdivision expresses the intention of the legislature. Despite the state court's refusal to follow the statute and its holding that the statute is invalid,[8] the legislature, subsequent to the court's declaration that the statute is invalid, has twice reenacted the statute in its original tenor (*Stats. 1907*, p. 319, and *Stats. 1939*, p. 2731). It is a well established rule that the legislature at the time of reenactment of this subdivision had in mind the existing judicial decisions declaring the act unconstitutional.[9] Counsel for respondent on reargument mistakenly declared that the legislature had not reenacted the statute since it had been held unconstitutional by the courts.

In *Baird v. Hutchinson*, 179 Ill. 435, Section 96 of the Election Laws, providing that the Supreme Court should determine election contests of *Superior Court* judges, was held unconstitutional. Section 98 of the Election Laws provided that the county court should hear election contests of "all other officers for the contesting of whose election no provision is made." It was contended that Section 98 authorized the county court to determine election contests involving *Superior Court* judges. The Il-

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[7]Subdivision 8: "Any other unlawful interference with the process or proceedings of a court."

[8]*In re Shortridge* (1893), 99 Cal. 526; *In re San Francisco Chronicle* (1934), 1 Cal. (2d) 630.

[9]*McColgan v. Jones, Hubbard & Donnell, Inc.* (1938), 11 Cal. (2d) 243, 247; *Anderson v. Jameson Corporation* (1936), 7 Cal. (2d) 60, 67.

linois Supreme Court declared that to ascertain the intent of the legislature, the entire statute should be read, *including* Section 96, which had been declared unconstitutional.

> "* * * the value of an invalid section as an indication of the intention of the law-making body is in nowise diminished by the fact it is discovered, after the enactment of the law, it was not within the power of the legislature to enact it. 'The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and validity to a provision of the law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional section of a statute is "stricken out." For all the purpose of construction it is to be incorporated as a part of the act. The meaning of the legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law.' (Dombaugh v. State, 20 Ohio St. 167.) Clauses, provisions or sections of an act, though unconstitutional and void, are to be considered in construing valid clauses, provisions or sections of the same act, in order to determine the legislative will. Swift v. Calnan, 102 Iowa, 212; Commonwealth v. Potts, 76 Pa. 164."
>
> 179 Ill. 440.

This principle of statutory construction is stated in 2 *Lewis' Sutherland Statutory Construction*, 2nd Ed., pp. 859-860.

CONCLUSION.

The reasonable tendency test is too vague and uncertain to meet the requirements of due process; it unnecessarily restricts and abridges the exercise of freedom of speech and press. Such undue restriction is not necessary to the maintenance of an independent judiciary. Application of the clear and present danger doctrine will protect freedom of speech and of the press and will not impair the integrity or independence of the courts. The record herein does not show that the editorials in question had a reasonable tendency to interfere with the orderly administration of justice.

It is respectfully submitted that the judgment of the Supreme Court of California should be reversed.

T. B. COSGROVE,
JOHN N. CRAMER,
Counsel for Petitioners.

F. B. YOAKUM, JR.,
Of Counsel.